IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 4.7.2007

CORAM

THE HON'BLE MR.JUSTICE P.D.DINAKARAN
AND
THE HON'BLE MR.JUSTICE P.P.S.JANARTHANA RAJA

T.C.(A).No.867 of 2007

The Commissioner of Income Tax
Salem1. .. Appellant

Vs.

M/s.S.Khader Khan Son
90-Syed Madar Street,
Shevapet, Salem. .. Respondent

Appeal under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'D' Bench dated 13.10.2006 in ITA No.479/Mds/2005 for the assessment year 2001-02 against the order of the Commissioner of Income Tax (Appeal) Salem for the assessment year 2001-2002 in ITA.No.35/2004-05 dated 30.11.2004 against the assissment order of the Assistant Commissioner of Income Tax Company Circle Salem dated 30.03.2004 in PAN/GIR.No.IDFs0005.

For Appellant : Mr.T.Ravikumar

J U D G M E N T

(Delivered by P.D. DINAKARAN, J.)

The Revenue has preferred the above tax case appeal against the order of the Income-tax Appellate Tribunal in ITA No.479/Mds/2005 dated 13.10.2006, raising the following substantial questions of law:-

(i) Whether on the facts and in the circumstances of the case, the income Tax Tribunal is right in law in holding that the statement made during a survey under Sec.133A of the Income Tax Act has no evidentiary value ?

(ii) Whether on the facts and in the circumstances of the case, the Income Tax Tribunal is right in not considering the fact that the Branch Contractors Agents Account Book in which entries were made subsequent to the survey and not found during the survey nor produced the survey, could be relied upon ?

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(iii) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in not considering the fact that the voluntary statement made without any coercion or duress given during the course of survey action under Sec.133A could form the basis of the assessment ?"

2.1. The brief facts are: The assessment year involved in this appeal is 2001-02. The assessee filed its return of income on 29.10.2001 disclosing an income of Rs.12,640/-. The return was processed under Section 143(1) of the Income-tax Act, 1961 (in short 'the Act') on 27.8.2002 and notice under Section 143(2) of the Act was issued on 27.8.2002 and served on the assessee on 24.9.2002. In the instant case, a survey action was conducted under Section 133A of the Act on 24.7.2001 in the premises of the assessee at 90, Syed Mada Street, Shevapet, Salem and one of the partners of the firm, by name Asif Khan, in his sworn statement offered an additional income of Rs.20,00,000/- for the assessment year 2001-02 and Rs.30,00,000/- for the assessment year 2002-03. However, the said statement was retracted by the assessee through its letter dated 3.8.2001 stating that the partner Asif Khan, from whom a statement was recorded during the survey operation under Section 133A, was new to the management and he could not answer to the enquiries made and as such, he agreed to an adhoc addition, which could never be achieved by the business owing to the severe competition and to the legislation by the Government prohibiting smoking in public places. The assessee, thus, contended that the statement of Asif Khan recorded under Section 133A has no evidentiary value. It was specifically contended that the power to examine a person on oath is specifically conferred on the authorities only during the course of any search under Section 132(4) of the Act and therefore, it was requested that the survey operations would not serve any useful purpose and the sworn statement recorded during the survey should not be given any weightage.

2.2. But, the assessing officer found that certain books were not produced or impounded at any time nor were they produced during the course of survey action and that certain entries in the books were made subsequent to the survey action and only at the time of survey action, the assessee had come forward with the admissions. Therefore, the assessing officer came to the conclusion that he had reason to believe that the assessee had evaded production of those books during the survey action and even after the survey action, as it could be seen from the survey folders. Accordingly, the assessing officer not accepting the book, viz., 'Branch Contractors' Agent Book' produced after the survey to support the claim of manufacturing process, came to the conclusion that it is impounded and accordingly, based on the admissions made by the assessee, which are directly relatable to the defects noticed during the action under Section 133A of the Act, he recomputed the assessment and sought for the balance tax payable by his assessment order dated 30.3.2004.

2.3. Aggrieved by the said assessment order dated 30.3.2004, the assessee preferred an appeal before the Commissioner of Income-tax (Appeals), who, by order dated 30.11.2006, held the issue in favour of the assessee. On appeal, at the instance of the Revenue, the Appellate

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Tribunal holding that there was no infirmity in the order of the Commissioner, dismissed the Revenue's appeal. Hence, the present appeal by the Revenue, raising the substantial questions of law referred to above.

3. All the three substantial questions of law raised by the Revenue revolve on the vexed question whether the materials collected and the statement elicited during the survey operation under Section 133A of the Act had any evidentiary value. For the purpose of clarity, it is apt to refer Sections 132(4) and 133A of the Act, which are extracted as hereunder:-

" 132. Search and Seizure. (1) ...

(2) ...

(3) ...

(4) The authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act.

Explanation. - For the removal of doubts, it is hereby declared that the examination of any person under this sub-section may be not merely in respect of any books of account, other documents or assets found as a result of the search, but also in respect of all matters relevant for the purpose of any investigation connected with any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act."

133A. Power of survey.--(1) Notwithstanding anything contained in any other provision of this Act, an income-tax authority may enter--

(a) any place within the limits of the area assigned to him, or

(b) any place occupied by any person in respect of whom he exercises jurisdiction, *or

(c) any place in respect of which he is authorised for the purposes of this section by such income-tax authority, who is assigned the area within which such place is situated or who exercises jurisdiction in respect of any person occupying such place,at which a business or profession is carried on, whether such place be the principal place or not of such business or profession, and require any proprietor, employee or any other person who may at that time and place be attending in any manner to, or helping in, the carrying on of such business or profession--

(i) to afford him the necessary facility to inspect such books of account or other documents as he may require and which may be available at such place,

(ii) to afford him the necessary facility to check or verify the cash, stock or other valuable article or thing which may be found therein, and

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(iii) to furnish such information as he may require as to any matter which may be useful for, or relevant to, any proceeding under this Act.

Explanation.--For the purposes of this sub-section, a place where a business or profession is carried on shall also include any other place, whether any business or profession is carried on therein or not, in which the person carrying on the business or profession states that any of his books of account or other documents or any part of his cash or stock or other valuable article or thing relating to his business or profession are or is kept.

(2) An income-tax authority may enter any place of business or profession referred to in sub-section (1) only during the hours at which such place is open for the conduct of business or profession and, in the case of any other place, only after sunrise and before sunset.

(3) An income-tax authority acting under this section may,--

(i) if he so deems necessary, place marks of identification on the books of account or other documents inspected by him and make or cause to be made extracts or copies therefrom,

(ii) make an inventory of any cash, stock or other valuable article or thing checked or verified by him,

(iii) record the statement of any person which may be useful for, or relevant to, any proceeding under this Act.

(4) An income-tax authority acting under this section shall, on no account, remove or cause to be removed from the place wherein he has entered, any books of account or other documents or any cash, stock or other valuable article or thing.

(5) Where, having regard to the nature and scale of expenditure incurred by an assessee, in connection with any function, ceremony or event, the income-tax authority is of the opinion that it is necessary or expedient so to do, he may, at any time after such function, ceremony or event, require the assessee by whom such expenditure has been incurred or any person who, in the opinion of the income-tax authority, is likely to possess information as respects the expenditure incurred, to furnish such information as he may require as to any matter which may be useful for, or relevant to, any proceeding under this Act and may have the statements of the assessee or any other person recorded and any statement so recorded may thereafter be used in evidence in any proceeding under this Act.

(6) If a person under this section is required to afford facility to the income-tax authority to inspect books of account or other documents or to check or verify any cash, stock or other valuable article or thing or to furnish any information or to have his statement recorded either refuses or evades to do so, the income-tax authority shall have all the powers under sub-section (1) of section 131 for enforcing compliance with the requirement made.

Explanation.--In this section,--

(a) "income-tax authority" means *a Commissioner, a @Joint Commissioner, a Director, a @Joint Director, an Assistant Director @or Deputy Director or an Assessing Officer, and for the

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purposes of clause (i) of sub-section (1), clause (i) of sub-section (3) and sub-section (5), includes an Inspector of Income-tax, if so authorised by any such authority ;

(b) "proceeding" means any proceeding under this Act in respect of any year which may be pending on the date on which the powers under this section are exercised or which may have been completed on or before such date and includes also all proceedings under this Act which may be commenced after such date in respect of any year.

4. In the instant case, there was a survey operation conducted under Section 133A of the Act in the assessee's premises and a statement was recorded from one of the partner. Assuming there were discrepancies and irregularities in the books of accounts maintained by the assessee, an offer of additional income for the respective assessment years was made by the parnter of the firm. But, such statement, in view of the scope and ambit of the materials collected during the course of survey action under Section 133A shall not have any evidentiary value, as rightly held by the Commissioner and the Tribunal, since such statement was not attached to the provisions of Section 133A of the Act. It could not be said solely on the basis of the statement given by one of the partner of the assessee-firm that the disclosed income was assessable as lawful income of the assessee. Since there was no material on record to prove the existence of such disclosed income or earning of such income in the hands of the assessee, it could not be said that the Revenue had lost lawful tax payable by the assessee.

5.1. In the decision in Pullangode Rubber Produce Co. Ltd. v. State of Kerala [(1973) 91 I.T.R. 18], the Apex Court held that an admission is extremely an important piece of evidence but it cannot be said that it is conclusive and it is open to the person who made the admission to show that it is incorrect.

5.2. Where a survey was conducted in the premises of the assessee, a medical practioner, and a statement was recorded from him, in which the assessee surrendered additional income and pursuant to the same, the assessing officer reopened the assessment, but during the course of which the assessee retracted the additional income offered and contended that the statement was the result of duress, which was not accepted by the assessing officer and also by the Tribunal holding that the statement is valid and that it was made without duress, a Division Bench of the Allahabad High Court The Allahabad High Court in Dr.S.C.Gupta v. Commissioner of Income-tax [(2001) 248 I.T.R. 782], of course, placing reliance on the decision of the Apex Court in Pullangode Rubber Produce Co. Ltd. v. State of Kerala [(1973) 91 I.T.R. 18] held that the burden that was laid on the assessee to establish that the admission made in the statement at the time of survey was wrong and that there was no additional income was not even attempted to be discharged and thus, the order of the Tribunal was based on facts and no question of law arose from it.

5.3. A power to examine a person on oath is specifically conferred on the authorities only under Section 132(4) of the Act in the course of any search or seizure. Thus, the Income-tax Act, whenever it thought fit and

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necessary to confer such power to examine a person on oath, has expressly provided for it, whereas section 133A does not empower any Income-tax Officer to examine any person on oath. Thus, in contradistinction to the power under section 133A, section 132(4) of the Income-tax Act enables the authorised officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence under the Income-tax Act. On the other hand, whatever statement recorded under section 133A of the Act is not given an evidentiary value, vide a decision of the Kerala High Court in Paul Mathews and Sons v. Commissioner of Income-tax [(2003) 263 I.T.R. 101].

5.4. The scope of Sections 132(4) and 133A also came up for consideration before the Kerala High Court in Paul Mathews and Sons v. Commissioner of Income-tax [(2003) 263 I.T.R. 101]. In the said case, the assessee therein made an attempt to draw a distinction between the two provisions, viz., Sections 132(4) and 133A. According to the assessee, there is no provision to administer oath or to take any sworn statement and that a mere admission or an acquiescence cannot be a foundation for an assessment and that any statement given during a survey has no effect as an "admission" nor can it be a statement on oath. According to the assessee, his statement during the survey with reference to any books of account can hardly be the basis for any assessment. It was also contended on behalf of the assessee that any material collected or any statement recorded during the survey under Section 133A cannot be put against the assessee, as the same has no evidentiary value. The Division Bench of the Kerala High Court, appreciating the stand taken by the assessee and after referring to Section 133A of the Act, held as hereunder:-

> ".. we find that the power to examine a person on oath is specifically conferred on the authorised officer only under section 132(4) of the Income-tax Act in the course of any search or seizure. Thus, the Income-tax Act, whenever it thought fit and necessary to confer such power to examine a person on oath, the same has been expressly provided whereas section 133A does not empower any Income-tax Officer to examine any person on oath. Thus, in contradistinction to the power under section 133A, section 132(4) of the Income-tax Act enables the authorised officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence under the Income-tax Act. On the other hand, whatever statement is recorded under section 133A of the Income-tax Act it is not given any evidentiary value obviously for the reason that the officer is not authorised to administer oath and to take any sworn statement which alone has evidentiary value as contemplated under law. Therefore, the statement elicited during the survey operation has no evidentiary value and the Income-tax Officer was well aware of this."
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> (emphasis supplied)

5.5. Similarly, when the issue, whether the expression "such other materials or information as are available with the Assessing Officer" in Section 158BB of the Income-tax Act, 1961, would include the materials gathered during the survey operation under Section 133A, came up for consideration before this Court in Commissioner of Income-tax v.

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G.K.Senniappan [(2006) 284 I.T.R. 220], a Division Bench of this Court, in which one of us was a party (P.P.S.JANARTHANA RAJA, J.), answered the question in the affirmative, against the Revenue and in favour of the assessee, holding that the materials collected during the survey under Section 133A cannot be taken into consideration while determining the undisclosed income in respect of block assessment as per section 158BB, as the same has no evidentiary value.

5.6. Again, when an identical question whether the material found in the course of survey in the premises of the builder could be used in the block assessment of the assessee, came up for consideration before this Division Bench in an unreported case in T.C.(A) No.2620 of 2006, this Court, by order dated 22.11.2006, of course, following the earlier decision of this Court in G.K.Senniappan's case reported in (2006) 284 I.T.R. 220, while confirming the order of the Tribunal, answered the question in favour of the assessee, in limine.

6. What is more relevant, in the instant case, is that the attention of the Commissioner and the Tribunal was rightly invited to the circular of the Central Board of Direct Taxes dated 10.3.2003 with regard to the confession of additional income during the course of search and seizure and survey operations. The said circular dated 10.3.2003 reads as follows:-

> " Instances have come to the notice of the Board wher assessees have claimed that they have been forced to confess the undisclosed income during the course of the search & seizure and survey operations. Such confessions, if not based upon credible evidence, are later retracted by the concerned assessees while filing returns of income. In these circumstances, on confessions during the course of search & seizure and survey operations do not serve any useful purpose. It is, therefore, advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income-tax Department. Similarly, while recording statement during the course of search & seizure and survey operations no attempt should be made to obtain confession as to the undisclosed income. Any action on the contrary shall be viewed adversely.
>
> Further, in respect of pending assessment proceedings also, assessing officers should rely upon the evidences/materials gathered during the course of search/survey operations or thereafter while framing the relevant assessment orders."

7. From the foregoing discussion, the following principles can be culled out:-

(i) An admission is extremely an important piece of evidence but it cannot be said that it is conclusive and it is open to the person who made the admission to show that it is incorrect and that the assessee should be given a proper opportunity to show that the books of accounts do not correctly disclose the correct state of facts, vide decision

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of the Apex Court in Pullangode Rubber Produce Co. Ltd. v. State of Kerala [(1973) 91 I.T.R. 18];

(ii) In contradistinction to the power under section 133A, section 132(4) of the Income-tax Act enables the authorised officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence under the Income-tax Act. On the other hand, whatever statement is recorded under section 133A of the Income-tax Act it is not given any evidentiary value obviously for the reason that the officer is not authorised to administer oath and to take any sworn statement which alone has evidentiary value as contemplated under law, vide Paul Mathews and Sons v. Commissioner of Income-tax [(2003) 263 I.T.R. 101];

(iii) The expression "such other materials or information as are available with the Assessing Officer" contained in Section 158BB of the Income-tax Act, 1961, would include the materials gathered during the survey operation under Section 133A, vide Commissioner of Income-tax v. G.K.Senniappan [(2006) 284 I.T.R. 220];

(iv) The material or infomration found in the course of survey proceeding could not be a basis for making any addition in the block assessment, vide decision of this Court in T.C.(A) No.2620 of 2006 (between Commissioner of Income-tax v. S.Ajit Kumar);

(v) Finally, the word "may" used in Section 133A (3)(iii) of the Act, viz., "record the statement of any person which may be useful for, or relevant to, any proceeding under this Act, as already extracted above, makes it clear that the materials collected and the statement recorded during the survey under Section 133A are not conclusive piece of evidence by itself.

8. For all these reasons, particularly, when the Commissioner and the Tribunal followed the circular of the Central Board of Direct Taxes dated 10.3.2003, extracted above, for arriving at the conclusion that the materials collected and the statement obtained under Section 133A would not automatically bind upon the assessee, we do not see any reason to interfere with the order of the Tribunal.

Accordingly, finding no substantial question of law arises for consideration, the tax case appeal stands dismissed.

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To

1.The Assistant Registrar,
Income Tax Appellate Tribunal
"D" Bench, Madras.

2.The Secretary, Central Board
of Direct Taxes, New Delhi.

3.The Commissioner of Income-
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4.The Assistant Commr. Of Income-tax,
Company Circle, Salem.

5. The Commissioner of Income Tax, Salem.

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1 CC To Mr.N.Muralikumaran, Senior Standing Counsel for IT., SR NO.40389.

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